2007 WL 4684659 (Me.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Maine.
Cumberland County

Lawrence D. GREEN, et al., Plaintiffs,
v.
SUBURBAN MORTGAGE ASSOCIATES, INC.,
and
SANDY RIVER HEALTH SYSTEM, LLC, Defendants.

No. CV-06-207.
March 16, 2007.

Plaintiffs' Opposition to Sandy River Health Care System, Llc's Motion for Summary Judgment

George J. Marcus, Esq. (Bar No. 1273).

David C. Johnson, Esq. (Bar No. 9447), Attorneys for Plaintiffs, Lawrence D. Green, Jed Prouty Investment Co., Inc., Jed Prouty Health Care, Inc. And Jed Prouty Health Care Management, Inc., Marcus, Clegg & Mistretta, P.A., One Hundred Middle Street - East Tower, Portland, Me 04101, (207) 828-8000.

Pursuant to Maine Rule of Civil Procedure 56, Plaintiffs Lawrence D. Green, Jed Prouty Investment Co., Inc., Jed Prouty Health Care, Inc., and Jed Prouty Healthcare Management, Inc. (collectively, the "Plaintiffs"), hereby oppose Defendant Sandy River Health System, LLC's ("Sandy River's") Motion for Summary Judgment (the "S/J Motion"). Pursuant to M.R.Civ.P. 10(c), Plaintiffs incorporate by reference their opposition (the "Suburban Opposition") to Suburban Mortgage Associates, Inc.'s ("Suburban") motion for summary judgment and all related documents.

BACKGROUND

This lawsuit has its genesis in the failure of an assisted living facility located in Bucksport, Maine (the "Facility"), shortly after it was built, and shortly after operations had commenced in accordance with financial models created by the Defendants. The timeline of this case begins in 1996, when the Plaintiffs began exploring the possibility of converting an existing inn and restaurant complex in Bucksport, Maine (the "Facility") into an assisted living facility, and ends in 2004, when the assisted Facility permanently shut its doors due to crippling financial problems.

In 1996, Plaintiff Lawrence D. Green ("Green"), who was then operating the Facility as an inn and restaurant, began looking for alternative uses for it. Sandy River's Statement of Material Facts (the "SMF"), ¶ 5. A relative, who was also a principal of Sandy River, suggested to Green that the Facility might be converted into an assisted living facility. [1] SMF, ¶ 6.

Intrigued by the idea, but without relevant experience or knowledge sufficient to make an informed decision, Green met with representatives of Sandy River about the idea in 1996. SMF, ¶¶ 6-7. Sandy River is in the business of offering health care services to the elderly, included assisted living, long-term care, post-hospital skilled nursing care, orthopaedic and stroke rehabilitation, brain injury services, and Alzheimer/dementia care at a number of facilities throughout Maine. Plaintiffs' Additional Statement of Material Facts (the "ASMF"), ¶ 71. Sandy River in turn recommended that Green speak to David N. Eaton ("Eaton"), a representative of Suburban. ASMF, ¶ 65. At the time of the introduction, Sandy River had a longstanding relationship with Eaton and Suburban. ASMF, ¶ 66.

The process of converting property to an elder care facility, filling it with residents, staffing it, and operating it as an assisted living facility was completely foreign to Green; he had absolutely no experience in the industry. [2] ASMF, ¶ 67. As such, he felt it necessary to retain one or more experts to advise him on this subject. ASMF, ¶ 70. Green likewise had never obtained an FHA-insured loan, and had no knowledge of how FHA-insured financing worked or how one applied for that financing. ASMF, ¶ 68. In their initial meetings, Sandy River's representatives assured Green that Sandy River was qualified to advise Green concerning the development, construction and operation of an assisted living facility, and that they would be willing to do so. ASMF, ¶ 69.

In February of 1997, based on his discussion with Sandy River, Green and Sandy River entered into a Development Agreement (the "Development Agreement") memorializing their relationship. Pursuant to the Development Agreement, Green formally retained Sandy River for a number of related purposes, including: (1) advising and counseling him regarding the feasibility and financial viability of converting the Facility into an assisted living facility, and operating it as such; (2) assisting him in exploring the possibility of obtaining Medicaid beds for the Facility; (3) advising him regarding obtaining HUD financing for the project; and (4) providing project development services related to the actual mechanics of physically converting the Facility. [3] ASMF, ¶ 75. In a nutshell, Sandy River was hired to advise Green on the wisdom of making an investment of hundreds of thousands of dollars.

Among its other responsibilities, Sandy River was tasked with "[d]evelop[ing] *pro forma* financials and Medicaid cost reports for two years," including revenue projections, staffing plans and costs, operating costs, and a capital budget." ASMF, ¶ 76. In conjunction with the proposed application to HUD for project insurance, Sandy River contracted to, *inter alia*, "develop[] additional forecasts to test feasibility of HUD financing." ASMF, ¶ 78. The Development Agreement contemplated that the parties would enter into a further contract whereby Sandy River would provide Plaintiffs with "ongoing management consultation services" once the Facility began operations. ASMF, ¶ 79. The Development Agreement also described the compensation payable to Sandy River for the advice and services to be rendered by it. ASMF, ¶ 80.

At the time that Green retained Sandy River, Green made it clear to Sandy River that he was relying entirely on it and Suburban to provide him and his affiliated corporations with prudent advice about the conversion of the Facility into an assisted living facility, as well as the operation and financing of the same. ASMF, ¶ 70. Further, Green informed Suburban and Sandy River that Green had no expertise in the assisted living business, and that all he had available to contribute was the physical Facility itself and a limited amount of funds. ASMF, ¶ 70. Given Sandy River's extensive experience in the industry, and assurances received from Sandy River's representative regarding Sandy River's expertise in the field, Green was confident that in retaining Sandy River to advise him, he was placing himself in good hands. ASMF, ¶ 72.

During 1996 and 1997, and following its retention by Green, Sandy River worked with Green and others retained by him to assess the feasibility of converting the Facility into an assisted living facility and operating it as such. ASMF, ¶¶ 73, 81, 82. During this period, Sandy River prepared numerous versions of business projections and financial analyses for the proposed assisted living facility. ASMF, ¶¶ 81, 82.

Pursuant to, *inter alia*, the Development Agreement, Sandy River and Suburban also commissioned various studies by third parties, including appraisals of the value of the Facility and market studies to be used, *inter alia*, in conjunction with the FHA-mortgage insurance process. ASMF, ¶ 83. As required by the terms of the Development Agreement, Sandy River "reviewed and provided support" on these various studies and appraisals and served, with Suburban, as Green's contact with the various providers of the same. ASMF, ¶ 84. Green relied on Sandy River and Suburban to solicit these reports and appraisals, interpret the same, and provide him with advice on how they impacted the proposed project. ASMF, ¶ 85. Indeed, all of the entities who generated these reports and appraisals were hired by Green on the recommendation of Suburban and/or Sandy River or with their approval; *none* of them was selected independently by Green. AMSF, ¶ 86.

During this period, while Green was still trying to decide whether to proceed with the assisted living project, Sandy River reviewed with him the various feasibility studies and projections prepared by Sandy River, Suburban, and others, and assured Green that the proposed assisted living facility was a viable project and that it was financially feasible. ASMF, ¶ 87. Based on

this advice and these various studies and projections, Green, in late 1996 or early 1997, decided to go forward with the project. ASMF, ¶ 87. Green's decision to go forward with the project meant that he would be required to contribute his real estate (the Facility) as well as cash toward the construction and operation of the project. ASMF, ¶ 87.

With the project having received a favorable endorsement from both Sandy River and Suburban, the construction loan provided by Suburban and insured by HUD (the "Construction Loan") closed in September 1998. In exchange for providing various services to Plaintiffs pursuant to the terms of the Development Agreement, Sandy River was paid approximately $33,235, mostly out of the proceeds of the Construction Loan. ASMF, ¶ 88. $17,235 of these funds, representing 1% of the value of the Construction Loan, would not have been paid to Sandy River had the Construction Loan not closed. ASMF, ¶ 90.

Renovations of the Facility commenced in late 1998. ASMF, ¶ 89. In June of 1999, the Facility opened as an assisted living facility. ASMF, ¶ 91. It commenced operations, including staffing, based on the projections and financial models provided by Sandy River and Suburban. ASMF, ¶ 92.

Following the opening of the Facility and prior to the execution of the Consulting Agreement (defined ***infra***), Sandy River continued to provide consulting services to Plaintiffs pursuant to the terms of the Development Agreement. ASMF, ¶ 93. Indeed, in June of 2002, Chip Cooper ("Cooper"), Sandy River's then vice president of operations, drafted a memorandum to Green describing his assessment of the Facility and recommendations regarding the same. ASMF, ¶ 94. In that memo, Cooper had some troubling news for Plaintiffs regarding the Facility's financial viability. ASMF, ¶ 95. More specifically, Cooper stated:

> Also, I enclose a "back of he [sic] envelop" [sic], (I don't have all the correct info) pro forma which projects a loss at 18 residents at an average rate of $95.00 which is what we spoke about on the phone. It looks to me as if we need to re-evaluate the configuration to get more revenue.

ASMF, ¶ 95.

In July of 2000, and as envisioned in the Development Agreement, Plaintiff Jed Prouty Management, Inc. ("JP Management") entered into a Consulting/Managing Agreement (the "Consulting Agreement") with Sandy River, pursuant to which Sandy River agreed to, *inter alia* (i) provide JP Management with general advisory, operational, consulting, marketing and administrative support; (ii) make recommendations regarding the "establishment and maintenance of clinical and operational policies and procedures which meet applicable regulatory and professional standards" and assist in implementing the same; (iii) assist JP Management in hiring and overseeing the Facility staff; (iv) review and make recommendations concerning personnel policies; and (v) assist in filling the Facility. ASMF, ¶ 96. Among other things, Green hoped that Sandy River could help remedy the Facility's shaky finances. ASMF, ¶ 97.

In conjunction with the execution of the Consulting Agreement and on the advice of Sandy River, Plaintiffs installed a Sandy River employee, Jeffrey Ackor, as the Facility's administrator effective September 1, 2000. ASMF, ¶ 98. At all relevant times, Ackor was also the administrator of Harbor Hill, a multi-level Nursing - Assisted Living Facility in Belfast Maine owned by Sandy River. ASMF, ¶ 99. Pursuant to the State of Maine's regulations, Green did not have the training and professional qualifications that would enable him to serve as the administrator of the Facility and was barred from participating in the day-to-day operations of the same. ASMF, ¶ 100. Although Ackor and Sandy River made a number of suggestions and recommendations about operating the Facility during the time the Consulting Agreement was in effect, Green was unable to adopt many of them (especially ones concerning staffing), because the Facility was cash-strapped and could not afford to adopt them (despite the fact that it was operating pursuant to the model and projections prepared by Sandy River and Suburban). ASMF, ¶ 102. There were simply no available funds to do so. ASMF, ¶ 102.

In February of 2001, Ackor stepped down as the Facility Administrator. ASMF, ¶ 103. Soon thereafter, on March 31, 2001, Sandy River formally notified Plaintiffs that it was terminating the Consulting Agreement, effective June 30, 2001, pursuant to the terms of the same. ASMF, ¶ 104. Following Ackor's departure and through the end of the term of the Consulting Agreement,

Sandy River did not provide any meaningful services to Plaintiffs under the same. AMSF, ¶ 105. As such, Plaintiffs declined to pay the monthly consulting fee allegedly due Sandy River under the Consulting Agreement for the months of March to April 2001 as well as $3,500 in admissions incentives. AMSF, ¶ 106.

By the late summer and early fall of 2001, after approximately two years of operations based on these financial models, the Facility for the first (and only) time achieved substantially full occupancy for a brief period of time, but notwithstanding the same, it was incurring significant losses, cash flow deficits, difficulties in staffing and other operational problems.[4] ASMF, ¶¶ 110, 111. During this period, operating at close to full capacity, the monthly cash flow available after the mortgage had been serviced (approximately $5,000) was insufficient to meet all of the Facility's operating expenses, despite the projections generated by Sandy River and Suburban to the contrary. ASMF, ¶ 111.

At that time, it became clear to Green and the other Plaintiffs that persistent cash flow deficits would not abate, that revenues would not reach projected levels, and that costs, particularly labor costs, would substantially exceed projected levels. ASMF, ¶ 107. Not surprisingly, Green and the other Plaintiffs then became aware that the business model originally provided to Green by Sandy River and Suburban was fatally flawed in that necessary expenses had been substantially understated, and projected revenues substantially overstated. ASMF, ¶ 108. Although debt service obligations were being met, the funds left over after the debt was serviced were insufficient to operate the Facility in a profitable manner, and in compliance with applicable regulations of the Maine Department of Human Services. ASMF, ¶ 111. Put another way, it was then readily apparent to Plaintiffs that the Facility was not going to be able to continue operating. ASMF, ¶ 109.

In 2002, the Construction Loan went into default, and Suburban assigned the Construction Loan and mortgage to HUD, who had guarantied its payment. ASMF, ¶ 113. HUD honored its guaranty, paid off Suburban, and then sold the loan and mortgage to a third party, which later commenced foreclosure proceedings. ASMF, ¶ 113. On March 17, 2004, after struggling for several years, never having earned a profit, and never having had adequate cash flow to meet its operating expenses, the Facility permanently closed its doors. ASMF, ¶ 112. Neither Green nor any of the Plaintiffs possessed the funds to redeem the property from the foreclosure proceedings. ASMF, ¶ 114. The Plaintiffs have lost a considerable amount of money that they had invested in an assisted living project that, unbeknownst to them at the time, was ill conceived from the start. ASMF, ¶ 115.

II. Plaintiffs' Breach of Fiduciary Duty Count Is Not Barred By the Statute of Limitations.

Sandy River attacks Plaintiffs' cause of action in Count II on two grounds. First it argues that there was no confidential relationship between it and Plaintiffs. Second, Sandy River asserts that even if there were a confidential relationship between the parties, the discovery rule is not applicable to this matter and Count II is therefore barred by the six year statute of limitations provided by 14 M.R.S.A. § 752. Even on the partial record now before the Court, it is clear that Sandy River's arguments must fail. As demonstrated below and as previously demonstrated in the Suburban Opposition, Sandy River was a fiduciary as to Plaintiffs, and the harm caused by its faulty advice was not discovered until 2001, well within the limitations period pertaining to breaches of fiduciary duty.

A. A Confidential Relationship Existed Between Plaintiffs and Sandy River Such that Sandy River Owed Them Various Fiduciary Duties.

In Maine, a fiduciary, or confidential, relationship exists when one party actually places trust and confidence in another party and there is a great disparity of position and influence between the two parties. *Ruebsamen v. Maddocks*, 340 A.2d 31, 36 (Me. 1975); *see Stewart v. Machias Savings Bank*, 762 A.2d 44, 46 (Me. 2000). The relationship does not need to be labeled as a "fiduciary" or "confidential" relationship in order for one to exist. Thus, the determination of whether a confidential relationship exists is a question of fact. *Ruebsamen*, 340 A.2d at 35.

Sandy River's characterization of its relationship with Green and the other Plaintiffs as simply an "arms-length business consulting contract" (S/J Motion, p. 14) is a manifest oversimplification of the relationship, and bears little resemblance to the actual facts. At the inception of the relationship, Green made Sandy River aware that he was relying entirely on its advice regarding the feasibility of converting and operating the Facility as an assisted living facility. ASMF, ¶¶ 67, 68, 70. Green also made Sandy River aware of the fact that he had no experience with either operating assisted living facilities or obtaining FHA-insured financing for the same. ASMF, ¶¶ 67, 68, 70. Although Green had prior experience in the hospitality industry from his years of operating motels, this history gave him no insight into the esoteric and regulation-bound world of operating a health care facility for the **elderly**, i.e. an assisted living facility operation. SMF, ¶¶ 2, 41, 44; ASMF, ¶67,68.

Sandy River was likewise aware that Green was placing his trust and confidence in it - indeed Sandy River invited him to do so. Sandy River knew that Green was relying on it to, *inter alia*, (1) advise and counsel him regarding the feasibility and **financial** viability of converting the Facility into an assisted living facility and operating it as such; (2) assist him in exploring the possibility of obtaining Medicaid beds for the Facility; (3) advise him regarding obtaining HUD **financing** for the project; and (4) provide project development services related to the actual mechanics of physically converting the Facility. ASMF, ¶ 75. The arrangement between the parties went even further than that - the Development Agreement also contemplated the provision of "ongoing management consultation services" by Sandy River once the Facility began operations. AMSF, ¶ 79. In fact, Sandy River provided these services for approximately the first two years the Facility was open (including before the Consulting Agreement was consummated). ASMF, ¶ 93.

While Green had neither experience nor expertise in the assisted living field, Sandy River is an acknowledged expert in the field; indeed their entire business is predicated on offering health care services to the **elderly**, including assisted living, long-term care, post-hospital skilled nursing care, orthopedics and stroke rehabilitation, brain injury services, and Alzheimer/ dementia care at a number of facilities throughout Maine. ASMF, ¶ 71. In other words, assisted living facilities are what Sandy River does.

In conjunction with Suburban, Sandy River commissioned numerous studies and created multiple business models that purported to show that the Facility could be converted and then operated profitably and in compliance with applicable state regulations. ASMF, ¶ 83. It was based on these projections and reports, as well as assurances from Sandy River, an acknowledged expert in the field, and others that the project was viable, that Green placed his faith in Sandy River and decided to mortgage the Facility and proceed with the conversion. ASMF, ¶ 87.[5] Simply put, based on Sandy River's advice, Plaintiffs invested hundreds of thousands of dollars and valuable real estate in a project that was, unbeknownst to Plaintiffs, doomed from the start.

Applicable Maine case law makes it clear that Plaintiffs simply need to illustrate the placement of trust and confidence in another party and a disparity of knowledge, position or influence between the two parties. E.g., Ruebsamen, 340 A.2d at 35. In the instant case, it is undisputed that Green's knowledge of the assisted living facility industry and the intricacies of FHA-insured **financing** was essentially nil, and Sandy River's substantial and extensive.[6] ASMF, ¶¶ 67, 68, 70-72. Conversely, there is no question that Sandy River knew this, and had extensive experience in these areas. ASMF, ¶¶ 69, 71. Green relied heavily on Sandy River's acknowledged expertise AMSF, ¶ 70, 72, 85, 87. As such, Sandy River assured Green that it would guide him through the process of evaluating the feasibility of the Facility conversion and the subsequent **financing** and construction. Green accepted and relied upon those assurances. ASMF, ¶¶ 70, 72, 85, 87. Sandy River's knowledge and influence was grossly disproportionate to that of Green who had no knowledge of the assisted living facility industry and no independent ability to assess the feasibility of the proposed conversion. Reidv. Key Bank of S. Maine, Inc., 821 F.2d 9, 18(1st Cir. 1987). ASMF, ¶¶ 67, 68, 70- 72. Likewise, Green's decision to enter the assisted living facility industry despite has lack of knowledge of the same and based on Sandy River's extensive experience, can also be characterized as a "letting down of all guards and bars" by Green. Reid, 821 F.2d at 18 (citations omitted).

A comparison of this case to *Morris v. Resolution Trust Corp.*, 622 A.2d 712 (Me. 1993) is instructive. In *Morris*, the Maine Supreme Judicial Court upheld a jury verdict finding a confidential relationship between a customer and a bank. 622 A.2d at 711-12. More specifically, the Court utilized the test articulated by the Supreme Judicial Court in *Ruebsamen* to determine

that (a) the customer placed her trust and confidence in the bank; and (b) there was a great disparity of position and influence between the parties. *Id.* Given the number of parallels between *Morris* and the case at bar, that decision bears additional scrutiny.

In *Morris*, the borrower purchased a piece of property and hired a contractor to rehabilitate the same. When construction costs rose unexpectedly, the contractor directed the borrower to the bank for additional **financing**. 622 A.2d at 710. The contractor and the bank had a prior business relationship. *Id.* at 710-11. The bank instructed the borrower to pay additional construction costs out of her own pocket, telling her those amounts could later be reimbursed from the additional **financing**. *Id.* at 711. Borrower relied on bank's assurances about the quality of contractor's work and contractor's reliability and continued to retain contractor to work on the project. *Id.* The Court found that a confidential relationship existed based on the borrower's placement of her confidence and trust in the bank and the great disparity in knowledge and influence between the parties vis-a-vis the contractor and his history. *Id.* at 711-12.

Morris demonstrates that under Maine law, a fiduciary relationship can be found to exist in an otherwise arms-length commercial relationship where the critical factors of (a) the placement of trust and confidence by one party to the relationship in the other and (b) the disparity of knowledge or expertise are found to exist. Both of these factors are indisputably present in this case, and as such, under applicable Maine law, a fiduciary relationship was established between Sandy River and the Plaintiffs.

B. Given the Confidential Relationship Between Plaintiffs and Sandy River, the Application of the Discovery Rule to the Accrual of Plaintiffs' Cause of Action Is Appropriate and Not Contrary to Either Established Precedent of Legislative Intent.

In Maine, it is well-settled that the discovery rule applies to actions involving a breach of a fiduciary duty. *Nevin v. Union Trust Co.*, 726 A.2d 694, 699 (Me. 1999) (citation omitted). Under the discovery rule, a cause of action does not accrue until the injured party discovers, or reasonably should have discovered, the cause of action. *Id.* Where one party acts as a fiduciary to another party and the harm giving rise to the cause of action is virtually undiscoverable absent an investigation that would be destructive to parties' fiduciary relationship, application of the discovery rule is appropriate.[7] *Id.* In other words, the beneficiary of a fiduciary relationship is under no duty to hire another fiduciary to test the performance of the first. Courts have recognized that this would entirely undermine the confidential relationship. Instead, the beneficiary is entitled to rely on the fiduciary's performance, and a cause of action will not accrue until that performance is discovered to have been deficient. *Cf.*, *Doe v. Harbor Schools*, Inc., 843 N.E.2d 1058, 1067 (Mass. 2006) ("...[A] beneficiary is entitled to approach without skepticism a fiduciary's representation that the fiduciary is investing the beneficiary's money on the beneficiary's behalf and is not required to ascertain the absence of foul play.")

Here, it is clear that there was simply no way for Plaintiffs to discover that the advice they received from Sandy River -- advising them to invest hundreds of thousands of dollars and their real property -- was erroneous and fatally flawed before the Facility was renovated, opened as an assisted living facility, and operated for a sufficient period of time in order to ascertain that the project would never work as conceived by Sandy River and the other consultants. When Green undertook the project, he had no independent knowledge or experience that would enable him to determine that the business model generated by Sandy River was fatally flawed from the outset. ASMF, ¶¶ 67,68, 70, 72. In order for Green to have made any such determination, he would have had to hire yet more outside advisors to test Sandy River's **financial** projections and models when they were made. *See Nevin*, 726 A.2d at 699. It is too bad that he did not do this, but in the context of a fiduciary relationship, the law does not impose this burden on Green and his affiliates.

Further, since Green did not have independent expertise, nor the obligation to hire an independent professional to test his own professionals, there was no opportunity to discover that Sandy River's advice was erroneous until some period of operation of the Facility had transpired, and the errors in the original **financial** models had become apparent. In this regard, it is noteworthy that Sandy River (as well as Suburban) had advised Green that there would be a "fill up period", i.e., a period of time that would elapse after opening and until the Facility would achieve substantial occupancy and its peak **financial** performance. ASMF, ¶

110. In this case, substantial occupancy was achieved not earlier than mid to late 2001 [8] Yet even at substantial occupancy, the project was foundering with inadequate cash flow and no profitability. ASMF, ¶¶ 110- 112. It was at this time, when substantial occupancy was first achieved, that it became apparent to the Plaintiffs that the Facility, which had been conceived and was operating upon the business models created by Sandy River and others that Sandy River recommended, would never become viable **financially**. ASMF, ¶¶ 107-109. The discovery of Sandy River's unsound advice occurred at this stage, in mid to late 2001, well within the six year limitations period.

Sandy River cites at length from a relatively recent decision rendered by Justice *Cole, Verizon New England, Inc. v. Fleet Elec. Svcs., Inc.*, 2006 WL 1990819 (Super Ct., June 2, 2006), to support the proposition that a broad interpretation of the discovery rule would eviscerate various statutes of limitations. S/J Motion, p. 13. It is difficult to disagree with the concerns that Justice Cole expressed as a matter of general public policy, but the discovery rule that applies in this case is not a new expansion, it is established law in this State, and the facts of this case fall squarely within it without any stretching or contortion of the rule. Justice Cole's admonition must be interpreted in light of the facts of the case that generated it - he expressed reluctance to accept the proposition that a car mechanic should be treated as a fiduciary in order to apply the discovery rule. This case, however, presents the paradigm case for application of the rule - advice from a professional entrusted with a client's investment decision involving hundreds of thousands of dollars. The *Verizon* decision, involving a car mechanic, simply provides no applicable precedent in this case. The six year statute began to run upon discovery, which occurred in 2001. ASMF, ¶¶ 107-111.

III. Plaintiffs' Breach of Contract Count Is Not Barred By the Statute of Limitations.

Pursuant to M.R.Civ.P. 10(c), Plaintiffs incorporate by reference their argument on this issue as made at pages 22 to 23 of the Suburban Opposition (Argument, § IV).

IV. Plaintiffs' Breach of Contract Claims Include Violations of the Development Agreement and the Consulting Agreement.

A. Sandy River's Breach of the Development Agreement.

Sandy River suggests that it did not breach the Development Agreement because that Agreement did not "expressly or impliedly obligate Sandy River to opine on, or warrant, the profitability of the Inn conversion project" (S/J Motion, p. 8). While it is true that the Development Agreement did not warrant the profitability of the Inn conversion project, it clearly called for Sandy River to opine on the feasibility of the project. Sandy River contracted with Green to provide a host of feasibility reports and **financial** projections. ASMF, ¶¶75-77. This included a covenant to produce **financial** and Medicaid cost reports for two years that would include: (a) revenue projections; (b) staffing plans and costs; and (c) operating costs. ASMF, ¶ 76. The Development Agreement also clearly bound Sandy River to provide other, related services, including (a) providing additional forecasts to test feasibility of HUD **financing**; (b) coordinating and submitting of HUD application materials; (c) serving as liaison with Suburban and HUD's office during Construction Loan processing; (d) reviewing and providing support on appraisals; (e) reviewing and providing support on market studies and; (e) coordinating the HUD Initial Closing. ASMF, ¶ 77. Clearly, Sandy River contracted to advise Plaintiffs as to the viability and feasibility of the assisted living project, to shepherd the project through to completion, and to provide operational support and advice.

While there is no guaranty or warranty associated with these services, Plaintiffs' claims against Sandy River are not for breach of such a guaranty or warranty; rather, Plaintiffs claim is that Sandy River breached the Development Agreement by failing to exercise due care, or reasonable prudence, in providing the agreed upon advice and services to Plaintiffs. As a result, a project that should have been terminated in its beginning phase was encouraged to proceed, resulting in significant losses to Plaintiffs. Sandy River's negligent or imprudent performance of services is actionable as a breach of contract. "There is implied in every contract for work or services a duty to perform skillfully, carefully, diligently, and in a workmanlike manner." 17A Am. Jur. 2d Contracts § 612 (2007); *see Gosselin v. Better Homes, Inc.*, 256 A.2d 629, 639 (Me. 1969); *see also Islam v. Option One*

Mortg. Corp., 432 F.Supp.2d 181, 196 (D. Mass. 2006); *Fieldwork Boston, Inc. v. U.S.*, 344 F.Supp.2d 257, 265 (D.Mass. 2004); *Redgrave v. Boston Symphony Orchestra, Inc.*, 557 F.Supp. 230, 237 (D.C.Mass. 1983).

Had Sandy River done its job with reasonable care, it would have discovered early on that the project was not viable, and Plaintiffs would not have lost their money investing in it. ASMF, ¶ 115. Plaintiffs' loss is directly related to Sandy River's breach - its failure to use due care in projecting the economic feasibility of the project.

B. Sandy River's Breach of the Consulting Agreement.

As an initial matter, it must be noted that the Consulting Agreement represented only the final stage of a continuum of services and advice (negligently) provided to Plaintiffs by Sandy River.[9] Those services began back in 1996 and 1997 when Sandy River assured Green that the Facility could be profitably converted and operated as an assisted living facility. As the facts show, those assurances were not credible and the only realistic advice that Sandy River could have offered Green - and the advice that it should have offered - was to not go through with the project at all.

Having failed to give this advice in the Development Agreement, Sandy River was not let off the hook. When it began operating under the Consulting Agreement, it should have recognized its prior errors, and advised Plaintiffs to cut their losses and shut down the Facility. ASMF, ¶ 116. Instead, Sandy River allowed a doomed project to continue, and Plaintiffs' losses to accumulate. *See* SMF, ¶ 58. As such, Sandy River's efforts to, *inter alia*, fill the Facility, assist in the hiring and oversight of staff, and make recommendations regarding regulatory compliance were entirely misguided, and of *no value* to Plaintiff (and even if they had some hypothetical value, *i.e.*, in helping the Facility pull out of its death spiral, Plaintiffs had no funds to implement them (ASMF, ¶ 102)). *See* SMF, ¶ 58. Plaintiffs were paying Sandy River for useless advice under the Consulting Agreement[10] and, worse, were induced to continue to pour funds into the Facility in a hopeless effort to make it solvent. ASMF, ¶ 112.

Given these facts, it is clear that Sandy River violated the terms of the Consulting Agreement by failing to provide prudent advice (i.e., to immediately shut the Facility down) to Plaintiffs. As a result of this breach, Plaintiffs were damaged in the amounts representing (a) consulting fees and referral fees paid to Sandy River; and (b) the additional funds Plaintiffs ploughed into the Facility after it began operations. In light of these undisputed facts, summary judgment is not warranted on the Count V of Plaintiffs' Complaint.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that Sandy River's motion for summary judgment be denied.

Dated: March 16, 2007

Footnotes

1 From the outset, Green envisioned being a developer and an investor in the Facility, but not a hands-on manager once it got underway. In any event, Green did not have the required training, as specified by applicable State regulations, to have qualified as a manager of the Facility. ASMF, ¶ 100.

2 Although Green had experience in the hospitality industry, having owned and managed several motels, that experience provided him with no insight into the assisted living facility industry, one that involved the delivery of health care services to the elderly, and that is governed by completely different market forces, as well as a thicket of health care related rules and regulations issued by the Maine Department of Human Services, with which he had no familiarity. ASMF, ¶¶ 67, 68.

3 Another entity, Dingo Management, was involved in the early stages of this process, but soon ceased all participation in the same. AMSF, ¶ 116.

4 The census of residents dropped precipitously thereafter and never approached substantially-full occupancy again. ASMF, ¶ 110.

5 Sandy River suggests that it is "telling" that Green "relied on, in addition to Sandy River, the professional advice of at least six other entities in his decision to go forward" with the Project. S/J Motion, pp. 11, 13. This is a misleading statement of the facts. While Green did in fact pay for the multiple studies and appraisals, he contracted for the same upon the express advice of Sandy River and Suburban. ASMF, ¶ 86. Indeed, Sandy River and Suburban had a hand in the selection of each one of these third parties, either picking them or approving the choices. ASMF, ¶ 86. Green himself *never* selected any of these parties independently. ASMF, ¶ 86. Moreover, it was part of Sandy River's contractual duties under the Development Agreement to "Review and provide" support vis-a-vis the studies and appraisals. ASMF, ¶ 77. Put another way, Green relied on Sandy River to review those documents, evaluate them, and provide him with advice as to how they impacted the feasibility of the project. ASMF, ¶ 85. As such, Sandy River's suggestion that it was only one of a bevy of consultants, instead of one of Green's two key advisors (together with Suburban), is completely inconsistent with the undisputed facts and an undue attempt to minimize its role.

6 The fact that Green is, in a general sense, an experienced businessman is of no moment. As described earlier, the assisted living facility industry is a world unto itself and Green's prior business experience provided him with no help in evaluating the feasibility of the project. ASMF, ¶¶67, 68. Green's ability to read a **financial** statement or grasp the concept of recourse **financing** did not translate into an understanding of health care for the **elderly**, or the market demand for assisted living, or the vagaries of state staffing and other health care regulations. *See Morris v. Resolution Trust Corp.*, 622 A.2d 708, 712 (Me. 1993) (rejecting the argument that to find a fiduciary relationship, one party must be completely incapable of acting to protect its own interest); *see Frontier Mgmt. Co., Inc. v. Balboa Ins. Co.*, 658 F.Supp. 987, 990 (D. Ma. 1986) ("the mere fact that.... sophisticated parties [are] involved in a business relationship does not preclude the existence of a fiduciary relationship between them.")

7 Indeed, this standard is remarkably similar to that espoused by the Court in the Pennsylvania Federal District Court case, *Calle v. York Hospital*, 232 F.Supp.2d 353, 360 (M.D.Pa. 2002), cited by Sandy River in the S/J Motion. S/J Motion, p. 14. Sandy River advances that case for the proposition that "the discovery rule is inapplicable [under Pennsylvania law] when the injury is discovered or is reasonably discoverable within the statutory period of limitations" and goes on to claim that the "Law Court has not addressed the [discovery rule] from this perspective." 232 F.Supp.2d at 360; S/J Motion, p. 14. This is simply untrue. In *Anderson v. Neal*, the Law Court found that where one party acts as a fiduciary to another party and the harm giving rise to the cause of action is virtually undiscoverable absent an investigation that would be destructive to the parties' fiduciary relationship, application of the discovery rule is appropriate. 428 A.2d 1189, 1992 (Me. 1981). The "virtually undiscoverable absent a damaging investigation" standard utilized by Maine and Pennsylvania's "discoverable or reasonably discoverable" test require a similar analysis from the Court. Under either test, it is clear that the harm inflicted by Sandy River not reasonably discoverable (and indeed was virtually undiscoverable) before the summer and fall of 2001 when the Facility reached substantially complete occupancy for the first time. *See* ASMF, ¶¶ 109-110.

8 Occupancy subsequently declined precipitously AMSF, ¶ 91.

9 Indeed, the Development Agreement explicitly contemplated the formation of the Consulting Agreement. ASMF, ¶ 79.

10 Given the useless nature of the advice and services provided, Sandy River's claim that it is entitled to an additional $13,500 in consulting fees (S/J Motion, p. 16; SMF, ¶ 63; Sandy River Counterclaim) is unavailing.

End of Document